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No.

In The

Supreme Court of the United States

October Term, 1980

OREST T. DUBNO, Commisioner of Revenue Services
of the State of Connecticut, et al,
Petitioner

vs.

MOBIL OIL CORPORATION, et al.,
Respondent

CARL R. AJELLO, Attorney General
of the State of Connecticut, et al,
Petitioner

vs.

TEXACO INC., et al
Respondent

ELLA T. GRASSO, Governor of the State of Connecticut, et al
Petitioner

vs.

AMERADA HESS CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude that the rule of abstention as enunciated by this court in *Bellotti* v. *Baird* (428 U.S. 132), and as raised by the Petitioner's Motion to Dismiss in the District Court for the District of Connecticut, was a "threshold issue" and therefore reviewable only by the Temporary Emergency Court of Appeals, even though the state statute in question (Sec. 13(b) of Connecticut P.A. 80-71) is susceptible to a constitutional construction?

2. Did the Court of Appeals properly conclude that the Temporary Emergency Court of Appeals has exclusive jurisdiction over the issue of whether Sec. 13(b) of Connecticut P.A. 80-71 is preempted by the federal Emergency Petroleum Allocation Act?

3. Did the Court of Appeals properly conclude that this action was not barred by 28 U.S.C. Sec. 1341, (known as the Johnson Act) even though the statute in question effectively assessed the burden of the gross receipts tax, imposed by Connecticut P.A. 80-71, on the respondent oil companies?

LIST OF PARTIES

As Required By Supreme Court Rule 21-1(b)

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

Petitioners

V.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON, U.S.A., INC., EXXON CORP., and SHELL OIL COMPANY

Respondents

CARL R. AJELLO, Attorney General of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

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Respondent

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OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this matter on January 28, 1981.

OPINIONS BELOW

The January 28, 1981 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is not yet officially reported and is reprinted in the separate appendix to this petition (App. A pp. 1a-7a) The prior opinion of the U.S. District Court for the District of Connecticut, also reprinted in the appendix, (App. B, pp. 8a-28a) is reported at 492 E. Supp. 1004 (D. Conn. 1980).

The January 28, 1981 opinion in the companion case of *Mobil et al* v. *Tully et al* is also reprinted in the appendix (App. C, pp. 29a-42a). This decision also is not yet officially reported. The prior opinion of the District Court in that case is reported at 499 F. Supp. 888 (N.D.N.Y. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered January 28, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sec. 13(b) of Connecticut Public Act 80-71. The pertinent portions of this act are reproduced in the Appendix (App. D, pp. 43a-45a).

It also involves various sections of the Emergency Petroleum Allocation Act (P.L. 93-159) and amendments thereto. This act, as amended and as subsequently codified in 15 U.S.C. Sec. 751 et seq., is reproduced in the Appendix (App. E, pp. 46a-85a). Section 211 of the Economic Stabilization Act of 1970 (codified in note to 12 U.S.C. Sec. 1904) is also involved and it is also

reproduced in the Appendix (App. F, pp. 86a-90a). 28 U.S.C. Sec. 1341 is also involved and is reproduced in the Appendix. (App. G, p. 91a).

STATEMENT OF THE CASE

The 1980 Session of the Connecticut General Assembly enacted Public Act 80-71 which provides for a 2% gross receipts tax on petroleum companies engaged primarily in the refining and distribution of petroleum products and which distribute such products to wholesale and retail dealers for marketing and distribution in the State of Connecticut. P.A. 80-71, Sec. 1 (App. D).

Section 13 of this Act further provides:

> (a) It is not the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies.
>
> (b) No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States.

The respondents are petroleum companies subject to the provisions of this Act. The respondents acknowledged the constitutionality of the tax imposed by Public Act 80-71, but by the

action brought to the District Court, challenged the constitutionality of Sec. 13(b) and sought declaratory and injunctive relief. The respondents alleged in their complaints that the District Court had jurisdiction of the action under 28 U.S.C. Sec. 1331 and 2201 in that the matter in controversy exceeded the sum of $10,000 and "arises under the Constitution of the United States and under the Emergency Petroleum Allocation Act (15 U.S.C. Sec. 751 et seq.).

The petitioners moved for dismissal of the action in the District Court based on the following three grounds:

1. That the District Court should have abstained from exercising jurisdiction in that Sec. 13(b) is susceptible to such a construction by the state courts that would moot the constitutional questions raised by the plaintiff.

2. That Sec. 13(b) is in effect a provision assessing the 2% Gross Receipts Tax imposed by P.A. 80-71 on the oil companies, and as such the District Court was prohibited from issuing an injunction against its enforcement by 28 U.S.C. Sec. 1341 (known as the Johnson Act).

3. That the District Court should have abstained in that the plaintiffs had adequate remedies in the state courts.

The District Court, without specifically ruling on the defendants' Motion to Dismiss, issued a declaratory judgment that Sec. 13(b) of Conn. P.A. 80-71 is unconstitutional in that it is pre-empted by federal law and thus violates the Supremacy Clause of the U.S. Constitution. The Court deferred action on the plaintiffs' request for injunctive relief. (App. B, pp. 27a-28a)

The petitioners appealed the judgment of the District Court to the Court of Appeals for the Second Circuit. In their pre-argument statement, the petitioners raised the above jurisdictional grounds and also contested the District Court's holding

that Sec. 13(b) was preempted by federal law. The respondents moved to dismiss the appeal alleging that under Sec. 5 of the Emergency Petroleum Allocation Act (15 U.S.C. Sec. 754(a) (1) (A)) and Sec. 211(b) (2) of the Economic Stabilization Act (codified in note to 12 U.S.C. Sec. 1904) (App. F, the Temporary Emergency Court of Appeals (hereinafter referred to as TECA) had exclusive jurisdiction over the preemption issue and that the abstention and 28 U.S.C. 1341 (Johnson Act) issues were "threshold issues" that had "no life apart" from the preemption issue and therefore were also exclusively within the jurisdiction of the TECA.

The Court of Appeals in its January 28, 1981 decision held that the TECA, and not it, had jurisdiction over the preemption and abstention issues and dismissed the appeal with regard to those issues. However, the Court of Appeals held that it did have jurisdiction over the anti-injunction act question and it affirmed the District Court on that question. (App. A, p. 6a)

The present petition is being brought to review the above decision.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT HOLDING THAT THE TEMPORARY EMERGENCY COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER THE ABSTENTION AND PREEMPTION QUESTIONS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, APPLICABLE DECISIONS OF THE TEMPORARY EMERGENCY COURT OF APPEALS, AND IS IN CONFLICT WITH THE PLAIN MEANING OF THE LANGUAGE OF 15 U.S.C. SEC. 754.

A. 15 U.S.C. Sec. 754 Vests The Temporary Emergency Court Of Appeals With A Very Limited Grant Of Jurisdiction

Section 5(a) of the Emergency Petroleum Allocation Act (hereinafter referred to as EPAA), as codified in 15 U.S.C. Sec. 754, in pertinent part provides as follows:

> **§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties**
>
> (a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

15 U.S.C. Sec. 754(a) (1) (A) incorporates by reference the Economic Stabilization Act (hereinafter referred to as E.S.A.), provisions which provide for the jurisdiction of the TECA. These provisions are reprinted in the notes following 12 U.S.C. Sec. 1904 (Banks and Banking) (West Supp. 1980). Sec. 211(b) (2) provides in pertinent part that TECA,

> shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title (ESA) or under regulations or orders issued thereunder.

It should be noted at the outset that 15 U.S.C. Sec. 754(a) (1) (A) by its language, makes the above TECA jurisdictional provisions applicable to only certain kinds of cases that arise under the EPAA. It plainly states that the judicial review provisions of the ESA apply only "to the regulation promulgated under Section 753(a) of this title, or to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter."

A "regulation promulgated under Section 753(a)" is a regulation of the Department of Energy establishing mandatory allocation and maximum prices for regulated petroleum products." Therefore, under 15 U.S.C. Sec. 754, TECA only has exclusive jurisdiction over cases arising under the EPAA's pricing regulations or under an "order" or "action taken by the President under this chapter." This grant of jurisdiction to TECA to hear cases arising under the EPAA is thus much more limited than TECA's jurisdiction to hear cases arising under the ESA. The Court of Appeals, in its holding that TECA had exclusive jurisdiction over the preemption and abstention issues in this case, completely ignored the impact of 15 U.S.C. Sec. 754 on the TECA's jurisdiction to hear EPAA questions, and erroneously equated the TECA's jurisdiction to hear questions arising under the EPAA with its jurisdiction to hear questions arising under the ESA. If the Court of Appeals had properly considered the impact of 15 U.S.C. Sec. 754 on the TECA's jurisdiction, it is

submitted that it would have come to the conclusion that it, and not TECA, has jurisdiction to hear the abstention and pre-emption issues posed in this case.

B. This Court And TECA Have Recognized The Limited Nature Of TECA's Jurisdiction

In *Bray* v. *United States,* 423 U.S. 73, 46 L.Ed.2d 215, 96 S.Ct. 307, this court noted that under 28 U.S.C. 1291, the courts of appeals, and not the TECA have the broad jurisdiction to review, "all final decisions of the district courts of the United States." This court stated at 423 U.S. 73-74 that the judicial review provision creating the TECA:

> was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of District Courts and thus gain in consistency of decision." S Rep No. 92-407, p. 10 (1971). *The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals* over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291 [28 U.S.C.A. § 1291]. (emphasis added)

TECA has also recognized that it is a court of limited jurisdiction and that its jurisdiction must be strictly construed. It has repeatedly refused to exercise jurisdiction over issues or claims such as those in this case which, even though they may touch upon the EPAA, do not "arise under" the EPAA or involve the interpretation or the validity of any of its substantive provisions. For instance see *Longview Refining Co.* v. *Shore,* 554 F.2d 1006 (Em. App. 1977); *Spinetti* v. *Atlantic Richfield Co.,* 522 F.2d 1401 (Em. App. 1975); *Associated General Contractors* v. *Laborers International Union Local 612,* 489 F.2d 749 (Em. App. 1973); *City of Groton* v. *Federal Power Commission,* 487 F.2d 927 (Em. App. 1973). In *Spinetti,* the plaintiff asserted claims under the antitrust laws as well as under FEO regulations. Noting that "courts of special jurisdiction should strictly construe their statutory grants of jurisdiction," quoting

United States v. *Cooper,* 482 F.2d 1393, 1398 (Em. App. 1973), the TECA held that the antitrust, fair trade, and contractual claims were appealable only to the Court of Appeals. The Court took jurisdiction, however, to consider the claim asserted under the oil allocation regulations.

C. The Court of Appeals And Not TECA Has Jurisdiction Over The Abstention Issue Raised In This Case

The primary question which the District Court resolved in this case was the interpretation of Section 13(b) of Connecticut Public Act 80-71. The State of Connecticut in its appeal to the Court of Appeals claimed that the District Court erred in the construction which it applied to Section 13(b). The State has claimed that Section 13(b) is reasonably susceptible to a construction which would either "avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem." *Bellotti* v. *Baird,* 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed. 2d 844 (1976); *Harrison* v. *NAACP,* 360 U.S. 167, 177, 79 S.Ct. 1025, 3 L.Ed. 2d 1152 (1959); *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725.

This court has repeatedly held that where (as here) there has been no construction of a state statute by a state court and where the statute is susceptible of a constitutional construction, the federal courts must abstain from exercising jurisdiction. *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643, *Bellotti* v. *Baird,* supra.

In *Railroad Commission* v. *Pullman* at 312 U.S. 501, this court stated that:

> The doctrine of abstention is a self-imposed limitation upon the jurisdiction of the federal courts whereby the federal courts 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state government' and for the smooth working of the federal judiciary.

The District Court in this case, therefore, should have abstained and allowed the state court to interpret the state statute.

It is clear that the interpretation of a state statute does not arise under the federal pricing regulations of the EPAA. Under the principles of comity and federalism that underly the abstention doctrine, it is the state court and not the TECA that should construe state statutes. Further, the Court of Appeals and not the TECA has jurisdiction to review the propriety of the District Court's interpretation of Section 13(b) and the District Court's failure to apply the doctrine of abstention, since the TECA has held that its jurisdictional grant of authority is limited and does not extend to the interpretation of any law other than the Emergency Petroleum Allocation Act of 1973. *Texaco Inc.* v. *Department of Energy,* 616 F.2d 1193 (Em. App. 1979).

The Court of Appeals, however, with little discussion held that the question of abstention is a "threshold question which has no life apart from the substantive claim" of preemption. (See App. A, p. 6a). As stated by the Court of Appeals, the TECA has resolved issues such as standing, mootness, ripeness, and joinder of parties. Those issues, however, were decided only in conjunction with a substantive EPAA issue on appeal. The TECA has held that those issues had "no life apart from that substantive claim" and were decided only as part of the Court's normal and necessary appellate function. *Quincy Oil Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (Em. App. 1980). In light of the numerous decisions of this Court holding that the abstention doctrine is rooted in our federal system of government as a means to insure the rightful independence of the state governments and to preserve the harmonious relation between state and federal authority (*Railroad Commission* v. *Pullman Company,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1940)), it cannot be properly argued that abstention and the principles which underly that doctrine are not substantive issues and are, instead, only ancillary questions necessary to effectuate the general appellate powers of the TECA. Further, and importantly, the interpretation to be afforded to a statute of an individual state does not present a situation requiring

TECA review to gain "consistency of decision." *Quincy Oil Inc.* v. *Federal Energy Administration, supra.*

It should be noted that the interpretation of a state statute does not become an "EPAA issue" merely because of an EPAA preemption claim is raised in a complaint. In *Governor of Maryland* v. *Exxon Corp.*, 279 m.d 410, 370 A.2d 1102, 1120-1121 (1977), *affirmed* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978), and in *Atlantic Richfield Co.* v. *Tribbitt,* Del. Ch., 399 A.2d 535 (1977), the individual states passed new statutes regulating the retail price of gasoline. The oil companies involved (including the present respondent Gulf Oil Corporation) instituted declaratory judgment actions in the *state courts* contesting the constitutionality of those enactments. Included in their *complaints* were allegations of conflicts with the federal EPAA, with the Commerce Clause and with other provisions of the United States Constitution. Apparently, neither the companies nor the courts viewed the construction and interpretation of those state statutes as presenting "EPAA issues" requiring exclusive review by a Federal District Court under Section 211(a) of the Economic Stabilization Act of 1970, 12 U.S.C. §1904 note, or requiring appellate review by the TECA under Section 211(b) (2). As Sections 211(a) and 211(b) (2) of the ESA confer the same exclusive jurisdiction on a District Court and on the TECA to hear all claims "arising under" the EPAA,[1] the fact that the state courts in *Governor of Maryland* v. *Exxon Corp., supra* and *Atlantic Richfield Co.* v. *Tribbitt, supra,* construed their own state statutes, despite a claimed conflict with the EPAA and the Commerce Clause demonstrates that a construction of a state statute does not constitute an "EPAA issue" requiring decision by a Federal District Court and the TECA. In

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[1]The companies' EPAA preemption claims in *Governor of Maryland* v. *Exxon Corp.*, supra and in *Atlantic Richfield Co.* v. *Tribbett,* supra, were raised in their complaints and did not enter the state court proceedings "by way of defense" which would have constituted an exception to the District Court's 211(a) "arising under" jurisdiction. *Coastal States Marketing* v. *New England Petroleum,* 604 F.2d at p. 183.

fact, those cases demonstrate that a state court is fully capable of interpreting its own state statutes and those cases fully support Connecticut's instant argument in favor of abstention. It also should be noted that in the oil companies' unsuccessful appeal to this Court, none of the parties questioned the jurisdiction of the State Court to hear that case, even though a claim of preemption by the EPAA was raised. (See Exxon, *supra* 437 U.S. 122, N.5).

It is clear, therefore, that the question of the proper construction of Section 13(b) of Connecticut P.A. 80-71 and the District Court's failure to apply the doctrine of abstention do not present "EPAA issues" on appeal. Consequently, the proper appellate avenue was to the Court of Appeals not the Temporary Emergency Court of Appeals.

D. The Court of Appeals Not The TECA Has Jurisdiction Over The Preemption Issue Raised In This Case

1. If this case arises under the EPAA it arises under Sec. 6B of the EPAA, which is not mentioned in 15 U.S.C. Sec. 754

If this case arises under the EPAA, as the Court of Appeals held, then the only possible provision of the EPAA that it could have arisen under is Sec. 6(b) of the EPAA, which is codified as 15 U.S.C. Sec. 755(b). This is the EPAA's explicit preemption provision and it provides as follows:

> **Preemption of State or local allocation regulations and orders**
>
> (b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

However, 15 U.S.C. Sec. 754, as has previously been noted, only gives the TECA jurisdiction over cases arising under regulations issued under Sec. 753a, which authorizes the EPAA's pricing and allocation regulations, or to "orders" or "actions" by the President under the EPAA. Congress did not include Sec. 6(b), 15 U.S.C. Sec. 755b, in Sec. 754. If Congress intended to incorporate the TECA jurisdictional provisions to claims of preemption under Sec. 6(b) of the EPAA, it easily could have included Sec. 6(b) in Sec. 754. The fact that it did not do so can only reasonably be interpreted as meaning that Congress did not intend that the TECA have jurisdiction over claims of preemption arising under the EPAA such as the claim of preemption in the instant case.

2. A review of the preemption standard applied by the District Court falls within the Court of Appeals' expertise and not the TECA's

The fact that the EPAA is discussed in a decision or that the EPAA is "related" to the issue is not determinative of whether an issue is an "EPAA issue." *Saint Mary's Hospital* v. *Ogilvie,* 496 F.2d 1324 (1974), *Texaco Inc.* v. *Dept. of Energy, supra.* Instead, an EPAA issue arises only when a determination is to be made which will directly question either the EPAA, or an order or regulation issued thereunder or an action of the President, requiring the TECA's particular expertise to provide national uniformity and consistency of decision. For instance, in *Bray* v. *U.S., supra,* in which the defendant petitioner was convicted of criminal contempt for refusing to obey a subpoena issued as part of an investigation under ESA, this Court, holding that the Court of Appeals, rather than TECA had jurisdiction, vacated the Court of Appeals judgment and remanded the case stating at 423 U.S. 75 that:

> Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is *not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme.* Indeed, a requirement of such review would

> only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals. (emphasis added)

Similarly, the reasons for exclusive TECA jurisdiction — consistency of opinion and maximization of TECA's expertise — are not present with regard to the preemption claim being made in the instant case. As this court recently noted in *Chicago and Northwestern Transportation Company* v. *Kalo Brick & Tile Company,* No. 79-1336, 49 U.S.L.W. 4232 (U.S. March 9, 1981), the determination of whether there is preemption is "essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict."

In this case, the District Court construed Section 13(b) of Connecticut Public Act 80-71 and compared it with the federal policy contained in the EPAA. No portion of the EPAA or any order or regulation issued under that Act or any action of the President was called into question before the District Court or before the Court of Appeals. Further, Section 13(b) specifically provides that it does not apply to any product regulated within the purview of the EPAA and the companies have admitted that any products which fall within the Connecticut taxing statute are, in fact, exempt from the EPAA. Unlike the cases interpreting substantive provisions of the EPAA, the instant case does not present questions which require the TECA's expertise.

Coastal States Marketing Inc. v. *New England Petroleum Corporation,* 604 F.2d 179, (2d Cir. 1979), and *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375 (10th Cir. 1978), which are referred to in the Court of Appeals' opinion in the *Tully* case, (See, App. C) both involved interpretation of substantive provisions of the EPAA and therefore required the TECA's expertise. Neither of these cases or any other cases cited by the respondents in the Court of Appeals involved claims of preemption under Sec. 6(b) of the EPAA. By its nature, a preemption decision can have no impact on federal policy or federal law because of the operation of the Supremacy Clause

of the United States Constitution. Whether or not a particular state statute runs afoul of federal law does not present a question of national uniformity, *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 128-129, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978), and does not require the TECA's particular expertise to provide consistency and uniformity of decision as would be the case where a portion of the EPAA was directly adjudicated. In its appeal, the State of Connecticut has questioned the preemption standard which the District Court applied to Section 13(b). A review of the proper preemption standard does not involve the application or interpretation of the EPAA or any rule or order issued thereunder. Instead, such review would only involve the application of established preemption law, an analysis that the Court of Appeals would normally undertake in any case where a claim of preemption is made.

The fact that the State's appeal of the District Court's preemption decision does not constitute an "EPAA issue" is confirmed by the decisions in *Governor of Maryland* v. *Exxon Corp., supra* and *Atlantic Richfield Co.* v. *Tribbett, supra* where EPAA preemption claims were raised in and decided by state courts. If such preemption claims were "EPAA issues" as the Court of Appeals held, Section 211(a) of the Economic Stabilization Act of 1970 would have required such issues to be initially adjudicated in a federal District Court and then appealed to the TECA. As the companies' EPAA preemption claims were not adjudicated in the District Courts in *Governor of Maryland* v. *Exxon, supra* or in *Atlantic Richfield Co.* v. *Tribbett, supra,* the instant EPAA preemption claims do not have to be reviewed by the TECA. Further, it is not apparent that either the District Court of the companies considered that the instant case involved an "EPAA issue." The companies questioned Section 13(b) on both Supremacy Clause and Commerce Clause grounds. Such issues present substantial constitutional questions. The fact that the issues were not immediately certified to the TECA pursuant to Section 211(c) of the ESA indicates that neither the Court nor the respondents viewed this case as presenting an EPAA issue at the District Court level.

II

IF THIS COURT DOES NOT GRANT THE WRIT THE PETITIONER STATE OF CONNECTICUT WILL BE DEPRIVED OF REVIEW OF ITS APPEAL ON THE MERITS WITH REGARD TO IMPORTANT SUBSTANTIVE QUESTIONS THAT SHOULD BE ANSWERED BY THIS COURT

A. The District Court's Decision Raises Important Substantive Questions That Should Be Answered By This Court

The District Court of Connecticut in its opinion did not hold that Sec. 13b of Connecticut P. A. 80-71 conflicts with any pricing regulation issued under the EPAA. Indeed, it would have been impossible for the District Court to find such a conflict. A reading of Sec. 13(b) makes it obvious that the Connecticut legislature carefully drafted this provision so as to avoid any possible conflict with federal law. By its terms, Sec. 13(b) only applies to petroleum products "exempt from the Federal Emergency Petroleum Allocation Act (P.L. 93-159." (See App. D) Therefore, it is impossible for there to be a conflict between this section and the federal law, since this section is, by its terms, automatically inapplicable if the federal law is applicable. Sec. 13(b), even if viewed as a price regulation, could not possibly directly conflict with any federal regulation on pricing, since so called "exempted" products fall under *no federal regulation* as to price. The grant of an exemption "means the release from the obligation to comply with any part or parts, or subparts thereof this chapter." 10 C.F.R. Sec. 205.2. Simply stated, there are *no federal regulations or orders pertaining to the price of so called "exempted" products.* Therefore, a *direct conflict* between such a regulation or order and Sec. 13(b) *is impossible.* The District Court, therefore, did not find any direct conflict with any federal regulation or order, nor did it find that the federal government "occupied the field" of petroleum pricing. Rather, the court found that Sec. 13(b) frustrated an articulated federal intention that an area which the federal government temporarily regulated and from which it has now withdrawn be

kept altogether vacant: in other words, it said that when the federal government left the field it took the states with it.

In effect, the District Court ruled that because the federal government regulated the price of petroleum products for a short period in response to an emergency and then withdrew from regulation of a large segment of the market, that the states were forever barred from regulating the area even a hundred years from now — *even though Congress never said so.* This conclusion is obviously absurd. When Congress spoke of "a gradual *return* to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975) (emphasis added), it meant a return to the status quo before the enactment of the EPAA and to restore pre-existing state powers.

We do not doubt that the federal government could, if it wished, establish a free market as the law of the land, nullifying state laws and effectively granting sellers of petroleum products a right to charge whatever price they desire. But neither the respondents nor the District Court explained how it can plausibly be thought that in 1973 Congress singled out the petroleum industry as one requiring extraordinary federal interference, and just two years later singled it out as the one industry among all others in which the free market was functioning so perfectly as to displace all state authority. So far as appears, in moving toward deregulation, neither Congress nor the administrators ever considered that their actions would eradicate ordinary pre-existing state powers. Certainly the federal authorities never gave any indication that by phasing out Congressional regulation of prices they intended to override state laws determining the incidence of states taxes such as Sec. 13b of Conn. Public Act 80-71.

Imputation of such an intention to Congress flies in the face of reality. If Congress had expressed any such intention, it would have been a matter of great public debate and conflict. Consumer lobbies would have been mobilized, members of Congress, many of whom even today regard the removal of federal price controls on petroleum as unwise, would have thun-

dered against such a permanent grant of freedom to the oil companies.

That none of this happened is the clearest demonstration that Congress had no such intent. To attribute such an intention to Congress now — five years later — would be to make a mockery of the legislative and political processes.

Another logical flaw in the District Court's theory is that when the Congress in 1975 provided for expiration of the regulatory authority, did it intend to oust state power in the interim? If Congress did intend to oust state power was the ouster to be temporary, with state power to regenerate spontaneously on October 1, 1981, upon expiration of the EPAA; or did it intend that the ouster of state power be permanent?

Not only is the District Court's decision logically flawed, it is also in clear conflict with numerous decisions of this Court. This Court has repeatedly said that "it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 156, 62 S.Ct. 491, 86 L.Ed. 754 (1942). *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10 L.Ed.2d 248, 256, 83 S.Ct. 1210 (1963), *reh den* 374 U.S. 858, 10 L.Ed. 2d 1082, 83 S.Ct. 1861. This Court has also said that there must be an "actual conflict" between the state and federal regulations as opposed to a "hypothetical one," *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960), *Goldstein* v. *California,* 412 U.S. 546, 554-555 (1973) and that "the teaching of this Court's decision...enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), quoting from *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 446, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960), and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966).

It is submitted that the District Court has sought out such a conflict "where none clearly exists" in the instant case.

B. The State of Connecticut Should Be Allowed A Hearing On The Merits Of Its Appeal

As noted above, the Petitioner State of Connecticut's appeal from the District Court's decision raised important substantive questions. The Court of Appeals holding that it lacks jurisdiction to hear the preemption and abstention questions effectively leaves the petitioner State of Connecticut with no opportunity for review of these questions, since the state did not appeal to the TECA. Even if this Court should conclude that the Court of Appeals is correct in its holding as to the allocation of jurisdiction between it and the TECA, it is, nevertheless, respectfully submitted that this Court should grant certification, vacate the judgment of the District Court, and remand this case back to the District Court and direct it to issue a new judgment from which the petitioner State of Connecticut can file a timely appeal to the TECA. This Court has granted this type of relief in numerous cases where, as in this case, the law was unclear or uncertain as to where the appeal should be taken. For instance, *see Mitchell* v. *Donovan,* 398 U.S. 427, 26 L.Ed.2d 378, 90 S.Ct. 1763 (1970), *Butler* v *Dexter,* 426 U.S. 262, 47 L.Ed.2d 774, 96 S.Ct. 1527 (1976), and *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (1975).

In *Donovan* which was a direct appeal from the decision of a three judge panel, this Court held that it lacked jurisdiction under 28 U.S.C. §1253, which provides for direct appeal to this Court from a three-judge Federal District Court order granting or denying "an interlocutory or permanent injunction," because the order appealed from did no more than deny the plaintiffs a declaratory judgment striking down the Communist Control Act. However, this court noted at 398 U.S. 431 that:

> A simple dismissal for want of jurisdiction, however, would leave the appellants with no recourse to appellate review, because they brought their appeal here rather than to the Court of Appeals and the time for appealing to the Court of Appeals has long since passed.

This Court therefore remanded the case to the District Court so that a "fresh" judgment, from which the plaintiff could take a timely appeal to the Court of Appeals, could be issued.

In the instant case, as in *Donovan,* and the other cases cited above, the petitioner would be left with no recourse for appellate review if this Court does not grant relief. It should also be noted that the law as to where the appeal should be taken to in the instant case was much more uncertain than in *Donovan* or the other cases cited above. As noted above, a reading of the plain language contained in 15 U.S.C. Sec. 754, which incorporates the TECA jurisdictional provisions with regard to certain cases arising under the EPAA, would not lead one to the conclusion that the TECA has jurisdiction over a case such as this one which challenges a state statute on preemption grounds.

Although dicta in some cases discussing the scope of TECA's exclusive appellate jurisdiction may be read to suggest that Section 754 of the EPAA rendered the ESA judicial review procedures fully applicable to *all* cases involving any EPAA issue, *see e.g., Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179, 182 (2d Cir. 1979); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.,* 591 F.2d 711 (Temp. Emer. 1979); *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375, 1379 (10th Cir. 1978), none of these cases involved challenges to the constitutionality of a state statute on the ground that the statute conflicted with the EPAA. None addressed the exclusivity of federal court jurisdiction — at either the trial or appellate level — of a preemption claim implicating Section 6(b) of the EPAA. Indeed, none of them focused on the limited scope of §754 of the EPAA. Instead, all of them were limited to holding what 15 U.S.C. §754 plainly states: that TECA has exclusive appellate jurisdiction — and presumably that the federal district court has exclusive original jurisdiction — of all suits involving the interpretation and enforcement of the mandatory allocation and price "regulation[s] promulgated under 753(a)." See *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* (purchaser of petroleum contends that it failed to pay seller for petroleum received because the contract price exceeded the

mandatory price controls set forth in 10 C.F.R. §212.2); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra* (same); *Mountain Fuel Supply Co.* v. *Johnson, supra,* (buyer in breach of contract action counterclaims that the seller disregarded ceiling prices set forth in the EPAA regulations and alternatively that the allocation and pricing provisions are unenforceable because they destroy his "competitive viability").

It follows from the above that the instant case was a case of first impression and was unique. *Never before* did any court hold that the *TECA has exclusive jurisdiction over a challenge to a state statute on preemption grounds.* Therefore, assuming that the Court of Appeals' decision is correct, it is the first decision to so hold, and prior to that decision, the law was highly uncertain as to where an appeal, such as that in the instant case, should be brought.

For the above reasons, we respectfully submit that even if this court should hold that the appeals court is correct on the preemption and abstention issues, that this Court should grant such relief in accordance with the *Donovan* decision as to allow the petitioner a hearing on the merits of its appeal.

III

THE COURT OF APPEALS DECISION HOLDING THAT THE DISTRICT COURT WAS NOT BARRED FROM HEARING THIS CASE BY THE JOHNSON ACT (28 U.S.C. SEC. 1341) RENDERS THE PROHIBITIONS OF THE JOHNSON ACT INEFFECTUAL.

In its appeal to the Court of Appeals, the State of Connecticut has contended that Section 13(b) of Public Act 80-71 is an integral part of a state taxing statute insuring the proper assessment of the economic burden created by the Connecticut gross receipts tax. Although Section 13(b) represents an untraditional application of an assessment provision of a state taxing statute, Section 13(b), nevertheless, falls within the scope of the Johnson Act, 28 U.S.C. 1341, barring federal District Court review.

CONCLUSION

For the reasons outlined above, it is respectfully submitted that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted

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